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No. 46

In the Supreme Court of the United States

OCTOBER TERM, 1954

REX TRAILER COMPANY, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 715

REX TRAILER COMPANY, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINIONS BELOW

The order of the District Court granting the Government's motion for summary judgment (R. 12-13) is not reported. The opinion of the Court of Appeals (Pet. App. pp. 11-18) is reported at 218 F. 2d 880.

JURISDICTION

The judgment of the Court of Appeals was entered on January 18, 1955 (Pet. App. p. 19). The

petition for a writ of certiorari was filed on April 11, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

STATUTE INVOLVED

Section 26 of the Surplus Property Act of 1944 (58 Stat. 765, 780, 50 U. S. C. App. (1946 ed.) 1635) provided in pertinent part:[1]

> (b) Every person who shall use or engage in or cause to be used or engaged in any fraudulent trick, scheme, or device, for the purpose of securing or obtaining, or aiding to secure or obtain, for any person any payment, property, or other benefits from the United States or any Government agency in connection with the disposition of property under this Act; or who enters into an agreement, combination, or conspiracy to do any of the foregoing—
>
> (1) shall pay to the United States the sum of $2,000 for each such act, and double the amount of any damage which the United States may have sustained by reason thereof, together with the costs of suit; or
>
> (2) shall, if the United States shall so elect, pay to the United States, as liquidated damages, a sum equal to twice the consideration agreed to be given by such person to the United States or any Government agency; or

[1] Section 26 of the Surplus Property Act, having been replaced by the virtually identical Section 209 of the Federal Property and Administrative Services Act of 1949 (63 Stat. 377, 392, 40 U. S. C. 489), was repealed by Section 502(a) of the latter Act (63 Stat. 399).

(3) shall, if the United States shall so elect, restore to the United States the property thus secured and obtained and the United States shall retain as liquidated damages any consideration given to the United States or any Government agency for such property.

* * * * *

(d) The civil remedies provided in this section shall be in addition to all other criminal penalties and civil remedies provided by law.

STATEMENT

This is an action brought by the United States pursuant to Section 26(b) of the Surplus Property Act of 1944 (*supra*, pp. 2-3) which grants to the United States civil remedies against "[e]very person who shall use or engage in * * * any fraudulent trick, scheme, or device, for the purpose of securing or obtaining * * * for any person any payment, property, or other benefits from the United States or any Government agency in connection with the disposition of property under this Act * * *." Section 26(b) authorizes the United States to recover (1) $2,000 for each such fraudulent act plus twice the amount of any damages sustained plus the cost of suit; or (2) twice the consideration which the purchaser agreed to pay; or (3) the property while keeping the full consideration paid by the fraudulent purchaser. See S. Rep. No. 1057, 78th Cong., 2d Sess., p. 14.

The Government's complaint, which was filed on August 9, 1950 (R. 1-3), alleged in Count I that

DISCUSSION

1. Contrary to petitioner's assertion (Pet. pp. 6-8), this Court's decisions in *Helvering* v. *Mitchell*, 303 U. S. 391, and *Marcus* v. *Hess*, 317 U. S. 537, fully support, if they do not require, the ruling in this case that the $2,000 plus double damage provision of Section 26(b)(1) of the Surplus Property Act is compensatory, not penal, so that the double jeopardy prohibition of the Fifth Amendment is inapplicable.

(a) *Marcus* v. *Hess*, as here, involved a situation in which the defendant had pleaded *nolo contendere* to an indictment for conspiracy to defraud the United States and had paid the fines imposed. After this criminal proceeding, an action was brought under the provision of the False Claims Act (Rev. Stat. 5438, 3490, 31 U. S. C. 231) which declares, in language substantially identical to that of the Surplus Property Act, that a person who commits certain frauds upon the United States

> shall forfeit and pay to the United States the sum of two thousand dollars, and, in addition, double the amount of damages which the United States may have sustained * * * together with the costs of suit * * *.

There, as here, the defendant sought to defeat the civil action on the ground that the statute under which it was brought prescribed a penalty and, accordingly, the prior criminal proceeding, coupled with the double jeopardy provision of the Fifth Amendment, precluded the judgment for $2,000.

plus double damages for each fraudulent act, sought by the Government in the civil suit.

This Court, however, expressly rejected these contentions, ruling that the provision of the False Claims Act that the Government was to recover $2,000 and double damages for each fraud was remedial and not penal. Pointing out that the double jeopardy provision applies only to "actions intended to authorize criminal punishment to vindicate public justice" and not to "civil, remedial actions brought to protect the government from financial loss" (317 U. S. at 548-549), the Court quoted from its earlier decision in *Helvering* v. *Mitchell*, 303 U. S. 391, 399, to the effect that (317 U. S. at 549):

> Congress may impose both a criminal and a civil sanction in respect to the same act or omission; for the double jeopardy clause prohibits merely punishing twice, or attempting a second time to punish criminally, for the same offense. The question for decision is thus whether * * * [the statute in question] * * * imposes a criminal sanction. That question is one of statutory construction.

And with reference to the statute before it the Court held (*ibid*):

> It is enough for present purposes if we conclude that the instant proceedings are remedial and impose a civil sanction. * * * We cannot say that the remedy now before us requiring payment of a lump sum [of $2,000] and double

> damages will do more than afford the government complete indemnity for the injuries done it.

Further commenting that the $2,000 plus-double damage provision of the False Claims Act was enacted by Congress, not as preserver of peace or to vindicate public justice, but in order to protect the property rights of the United States, rights which the Government has just like any other person (at 549-550), the Court concluded (at pp. 551-552):

> It is true that "Punishment, in a certain and very limited sense, may be the result of the statute before us so far as the wrong-doer is concerned," but this is not enough to label it as a criminal statute. *Brady* v. *Daly*, 175 U. S. 145, 157. We think the chief purpose of the statutes here was to provide for restitution to the government of money taken from it by fraud, and that the device of double damages plus a specific sum was chosen to make sure that the government would be made completely whole. * * * The inherent difficulty of choosing a proper specific sum which would give full restitution was a problem for Congress.[2]

As already indicated, *Marcus* v. *Hess*, refers to the Court's earlier decision in *Helvering* v.

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[2] See, also, *United States* v. *Grannis*, 172 F. 2d 507, 511 (C.A. 4), certiorari denied, 338 U.S. 860, where the Court of Appeals for the Fourth Circuit held that "It is clearly established that the defense of double jeopardy is not applicable to civil actions under the federal false claims statute."

Mitchell, 303 U. S. 391. In that case, there had also been criminal proceedings against the defendant for fraud under the tax laws, and the defendant sought to defeat the Government's later claim for an additional 50% over the tax on the ground that, as a penalty, its recovery was barred by the prohibition against double jeopardy. In rejecting this claim, the Court observed (303 U. S. at 401):

> The remedial character of sanctions imposing additions to a tax has been made clear by this Court in passing upon similar legislation. They are provided primarily as a safeguard for the protection of the revenue and to reimburse the Government for the heavy expense of investigation and the loss resulting from the taxpayer's fraud. * * *

And the Court went on to point out that the basic question is one of statutory construction and that the evidence demonstrated that Congress intended a civil, not a criminal, sanction (*id.*, at 401-402):

> In §§ 276 and 293 it is provided that collection of the 50 per centum addition, like that of the primary tax itself, may be made "by distraint" as well as "by a proceeding in court." If the section provided a criminal sanction, the provision for collection by distraint would make it unconstitutional. Compare *Lipke* v. *Lederer*, 259 U. S. 557; *Regal Drug Corp.* v. *Wardell*, 260 U. S. 386. See also *United States* v. *Chouteau*, 102 U. S. 603, 611;

Boyd v. *United States*, 116 U. S. 616; *Lees* v. *United States*, 150 U. S. 476; *United States* v. *La Franca*, 282 U. S. 568. That Congress provided a distinctly civil procedure for the collection of the additional 50 per centum indicates clearly that it intended a civil, not a criminal, sanction. Civil procedure is incompatible with the accepted rules and constitutional guaranties governing the trial of criminal prosecutions, and where civil procedure is prescribed for the enforcement of remedial sanctions, those rules and guaranties do not apply. * * *

(b) The construction accorded by this Court to the $2,000 plus double damage provision in *Marcus* v. *Hess, supra*, is fully applicable to the virtually identical provision of Section 26(b)(1) of the Surplus Property Act.[3] This is particularly so since both provisions relate to frauds upon the Government, the False Claims Act pertaining to frauds in connection with claims submitted *to* the Goverment and Section 26(b)(1) dealing with frauds in procuring property *from* the Government. Indeed, if the stronger "forfeit and pay" language of the False Claims Act was not deemed by this Court to convert the $2,000 plus double damages provision of that Act into a penalty, it would seem that the weaker term "pay" used in Section

[3] The only difference between the False Claims Act and the Surplus Property Act is that the former provides that the defrauder shall "forfeit and pay" $2,000 plus double damages and the latter provides only that he shall "pay."

26(b)(1) would *a fortiori* militate against the construction of that provision pressed by petitioner.

Moreover, in view of the express recognition in both *Marcus* v. *Hess* and *Helvering* v. *Mitchell* that the problem of the nature of the remedy is basically one of statutory construction and Congressional intent, it is significant that *Marcus* v. *Hess* was decided in January 1943, shortly before the enactment of the Surplus Property Act of 1944. It is fair to assume that the draftsmen of Section 26(b)(1) used the damage formula of the False Claims Act, construed in *Marcus* v. *Hess*, as their model for Section 26(b)(1), and in enacting that provision Congress may be assumed to have adopted this Court's construction. This is also evidenced by the express language of Section 26(d) of the Surplus Property Act, *supra*, p. 3, describing subsection (b) as providing "civil remedies". Moreover, since Sections 26(b)(2) and (3) (providing only for multiple damages) are plainly of a compensatory nature,[4] it would be incongruous to conclude that Congress intended to include in the same section a penal sanction and two compensatory remedies. That Congress had no such purpose is clear from the pertinent committee report (S. Rep. No. 1057, 78th Cong., 2d Sess., p. 14), which

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[4] It has been generally recognized that statutes which provide for multiple lump sum or minimum damages, or a combination of these, are compensatory, not punitive. See, *e.g.*, *Stockwell* v. *United States*, 13 Wall. 531, 547, 551; *Overnight Motor Co.* v. *Missel*, 316 U.S. 572, 583-4; *Atchison, Topeka & Santa Fe Ry.* v. *Nichols*, 264 U.S. 348, 351; *Woolworth Co.* v. *Contemporary Arts*, 344 U.S. 228; *Brady* v. *Daly*, 175 U.S. 148.

government was willing to make these sales to veterans was more favorable than in the market place where gray and black market conditions were not uncommon. Defendant's fraud caused the government to deal with a class to which it did not desire to sell its surplus motor vehicles. Further, by its conduct if there were any vehicles left after supplying the wants of service men, various agencies of the Federal Government had next priority. If the supply was exhausted by frauds such as perpetrated by the defendant there was no other place for Government Agencies to purchase needed vehicles except on the open market.

2. Petitioner correctly asserts a conflict between the holding below and *United States* v. *Witherspoon*, 211 F. 2d 838 (C. A. 6) (Pet. pp. 5-6). In *Witherspoon* the Court of Appeals for the Sixth Circuit rejected the Government's contention that the $2,000 plus double damage provision of Section 26(b)(1) was remedial only, holding instead that that section provided for a penalty, and hence that action thereunder is subject to the statute of limitations for suits for penalties contained in 28 U. S. C. 2462. This holding shows that a conflict of decision does in fact exist.[5] Consequently,

[5] Although the holding below conflicts with *Witherspoon*, it is in accord with *United States* v. *Weaver*, 207 F. 2d 796 (C.A. 5) where in a factual situation on all fours with *Witherspoon* the Court of Appeals for the Fifth Circuit held that Section 26(b)(1) is not penal and hence not subject to 28 U.S.C. 2462.

while we believe that the decision here is clearly correct and virtually required by *Marcus* v. *Hess*, and that *Witherspoon* is wrong,[6] we do not oppose the granting of certiorari, particularly since there are a large number of cases—many already pending in the courts and others to be filed—in which the determination of the nature of the sanction provided by Section 26(b)(1) may be dispositive.

Respectfully submitted,

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MAY, 1955.

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[6] As the court below pointed out in regard to *Witherspoon*, "It is interesting to note that the opinion made no mention of *Helvering* v. *Mitchell*, *supra*, or *Marcus* v. *Hess*, *supra*, nor why these decisions which we regard as persuasive, were regarded by that court as inapplicable." (Pet. App., p. 16, fn. 2). These cases were urged upon the Sixth Circuit by the Government.

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states that Section 26(b) gives to the United States "the option of selecting among three different measures of damages," thus manifesting the Congressional view that all three subparagraphs of Section 26(b) were to be *in pari materia* and, of particular significance here, that subparagraph (1), as well as the other subparagraphs, was intended as compensatory in nature.

(c) Nor is there any substance to petitioner's attempted distinction of *Marcus* v. *Hess* and *Helvering* v. *Mitchell* on the ground that, in those cases, the frauds resulted in actual damages to the Government whereas here the answer denied any such damages. (Pet. p. 7.) First, in *Marcus* v. *Hess* there was no actual damage to the United States in regard to eight of the contracts and this Court, as well as the District Court, rejected the contention that the absence of actual damage precluded recovery of the $2,000 lump sum provided by the False Claims Act. 317 U. S. at 552-553; 41 Supp. 197, 218 (W. D. Pa.); see *United States* v. *Rohleder*, 157 F. 2d 126, 129 (C. A. 3). Similarly, in *Helvering* v. *Mitchell*, the Government suffered no actual damage as a result of the taxpayer's fraud, yet the Court held that the 50% additional assessment was not a penalty because it was intended to reimburse the Government for the costs incurred by it in investigating the taxpayer's frauds. See 303 U. S. at 398-405.

Moreover, as already shown, *supra*, pp. 6-10, the determination whether the provision is remedial or penal turns upon the legislative purpose, *i.e.*,

whether Congress intended to impose a civil remedy or a criminal sanction, and not upon whether the fraud resulted in specific, provable, damage to the Government. In any case, as the court below noted (Pet. App. pp. 17-18):

> We may concede that if veterans and all others having priority did not purchase the motor vehicles advertised, that defendant or other persons having no priority might have purchased same. However, such assumption ignores realities. The shortage of civilian motor vehicles in 1946-7 was very acute and was well known. Motor vehicles made up a large portion of the surplus property set aside for the exclusive use of veterans. The objectives of the Surplus Property Act in 1944 were to facilitate and regulate the orderly disposal of surplus property while giving effect to 20 enumerated purposes, among which were (f) the giving of an opportunity to returning veterans to establish themselves in business, agriculture or professional life and (h) the discouragement of disposal of surplus property to speculators.
>
> We think the government was damaged in several respects and in a manner difficult to assess in monetary damages. The government wished to sell its surplus motor vehicles to certified veterans in order to assist in their reassimilation into civil life, and it was natural that the prices and conditions under which the